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No. 86-389

In The Supreme Court of the United States

October Term, 1986

CITY OF BIRMINGHAM,
Petitioner

v.

AMERICAN CIVIL LIBERTIES UNION and
MICKI LEVIN,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

The petitioner correctly sets forth the procedural history of the case and sets forth the facts in the light most favorable to the petitioner. However, the petitioner fails to state certain other facts testified to by Mr. Kenning, the City Manager, which were noted by the Court of Appeals and by the District Court. Mr. Kenning testified that in Birmingham, "There are Nativity Scenes in every church around," and it is not disputed that the Nativity Scenes "in every church around" are indistinguishable from the Nativity Scene on the Birmingham City Hall front lawn. Mr. Kenning also testified that, "The Nativity Scene, whether it be at City Hall or any other place, does have a religious significance to me," and further that the Nativity Scene is "consistent with the recognition of the Christmas Day and the significance of that date as being the birth of the Christ Child." 791 F.2d at 1566.

The plaintiff, Micki Levin, is not a "nominal plaintiff," as the petitioner suggests. To the contrary, she is a resident of the City of Birmingham, and so is directly affected by the display of the Nativity Scene on the Birmingham city hall front lawn.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. There Are No "Special and Important Reasons" Justifying Review by This Court in the Present Case.

The present case does not involve any "important question of federal constitutional law which has not been, but should be settled by this Court." In this case, the Court of Appeals was called upon to do no more than to apply this Court's controlling precedents and the applicable constitutional doctrine propounded by this Court to the facts before it, and the result reached by the Court of Appeals is fully consistent with such controlling precedents and applicable constitutional doctrine.

In *Lynch v. Donnelly,* 465 U.S. 668 (1984), this court delineated the limited circumstances in which the official display of a Nativity Scene by a governmental body would be consistent with the commands of the Establishment Clause. It held that the *inclusion* of a Nativity Scene in an extensive Christmas holiday season display, otherwise consisting entirely of the secular symbols of Christmas, did not violate the Establishment Clause. This was because the inclusion of the Nativity Scene in the display was related to the secular purpose advanced by the display itself, the official celebration of the Christmas holiday season by the city, and so did not impermissibly involve the city in the endorsement of religion. In that context the Nativity Scene was deemed to have lost most of its religious significance, and did no more than depict the historical origin of what has become a primarily secular holiday. This Court's holding in *Lynch* is clear and needs no further explication.

The Christmas holiday season display that is at issue in the present case consists solely of an unadorned Nativity Scene, the only purely religious symbol of Christmas. The City of Birmingham has maintained this unadorned Nativity Scene as an official Christmas holiday season display on the Birmingham City Hall front lawn for many years. The unadorned Nativity Scene on the Birmingham City Hall

front lawn does not differ in any material respect from the Nativity Scenes displayed in Birmingham "in every church around." The Birmingham City Hall front lawn thus had become indistinguishable during the Christmas holiday season from the Christian churches of Birmingham, and this condition, the District Court and the Court of Appeals found, offends the Establishment Clause.

The Court of Appeals, carefully applying this Court's holding in *Lynch* to the facts of the present case, concluded that an official display of an unadorned Nativity Scene on a city hall front lawn during the Christmas holiday season had the purely religious effect of endorsing Christianity. There was no way that it could conclude otherwise in light of the holding and rationale of *Lynch*. As this Court emphasized repeatedly in that case, it was the *inclusion* of the Nativity Scene in the extensive and otherwise purely secular Christmas holiday season display which, *in that context*, deprived the Nativity Scene of any religious effect. As Justice O'Conner stated in *Lynch:* "The evident purpose of including the creche in the larger display was not the promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." 465 U.S. at 691 (O'Conner, J., concurring).

When the Nativity Scene stands on the city hall front lawn alone, unaccompanied by the panoply of secular symbols that were present in *Lynch*,. and indistinguishable from the Nativity Scenes displayed on the front lawns of the Christian churches of Birmingham, the only possible effect of the display is an official endorsement of Christianity. Since the Establishment Clause requires that the government "must pursue a course of complete neutrality toward religion," *Wallace v. Jaffee*, ___ U.S. ___, 105 S.Ct. 2479, 2492 (1985), such an official endorsement of Christianity by

a governmental body is a pristine violation of the Establishment Clause.[1]

The present case, therefore, involves no important question of federal constitutional law, necessitating the exercise of jurisdiction on certiorari by this Court.

II. The Federal Courts of Appeal Are in Agreement That Any Official Display of a Purely Religious Symbol by a Governmental Body Is Violative of the Establishment Clause.

The decision of the Court of Appeals in the present case is in accord with recent decisions of other federal courts of appeal, holding violative of the Establishment Clause any official display of a purely religious symbol by a governmental body. In *American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir., 1986), decided just five days before the present case, the Seventh Circuit invalidated a city's display of a lighted Latin cross on a city building during the Christmas holiday season. In *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir., 1985), the Tenth Circuit invalidated a county government's use of a seal that contained a Latin cross and a Spanish motto, translated into English as "With This We Conquer." In *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d

[1] In his dissent in the case at bar Judge Nelson derisively referred to the majority's holding as embodying a "St. Nicholas too" test, and said that such a test was not required by this Court's holding in *Lynch*. 791 F.2d at 1569. With all due respect, this remark completely misperceives the nature of this Court's holding in *Lynch*, and distorts the careful application of the *Lynch* holding by the Sixth Circuit majority in the present case. This Court's holding in *Lynch* represented an application in the particular context of that case, of the well-settled Establishment Clause principle that where governmental action advances a valid secular purpose and has a primarily secular effect, there is no violation of the Establishment Clause merely because that action has an incidental religious effect as well. *C.f. McGowan v. Maryland*, 366 U.S. 420 (1961). This was how the majority of the Court viewed the inclusion of the Nativity Scene in the extensive Christmas holiday season display in *Lynch*. But the display of an unadorned Nativity Scene can only have a religious effect, and so is necessarily violative of the Establishment Clause.

1098 (11th Cir., 1983), the Eleventh Circuit invalidated the display of a lighted Latin cross in a state park.[2] As these cases indicate, the courts of appeal are in clear agreement that any official display of a purely religious symbol by a governmental body is violative of the Establishment Clause.

In a spurious effort to find a conflict among the courts of appeal, the petitioner relies on *McCreary v. Stone*, 739 F.2d 716 (2d Cir., 1984), *aff'd. by an equally divided Court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, ___ U.S. ___, 105 S.Ct. 1859 (1985). That case, of course, did not involve the official display of a religious symbol by a governmental body, but a city's refusal to allow a private group to display a Nativity Scene in a traditional public forum during the Christmas holiday season. The Second Circuit held that so long as this display in a public forum carried an appropriate disclaimer message, there was no danger that the city would be associated with the religious symbol. This being so, the refusal of the city to permit the display was held to be violative of the First Amendment's equal access principle.

In the course of its opinion, the Second Circuit expressed the view that this Court's holding in *Lynch* was not based primarily on the fact that the Nativity Scene was included in the extensive Christmas holiday season display, but on the fact that the Nativity Scene was displayed during the Christmas holiday season itself. On this basis the petitioner argued before the Court of Appeals that the Second Circuit's decision in *McCreary* should be read as upholding the display of an unadorned Nativity Scene on the city hall front lawn. While the Sixth Circuit indicated that if this is what the Second Circuit held in *McCreary*, it was in disagreement with that holding, 791 F.2d at 1566, the disagreement would have to be with the Second Circuit's analysis

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[2] In *Burelle v. City of Nashua*, 599 F.Supp. 792 (D.N.H. 1984), the District Court, in reliance on the District Court's decision in the present case, invalidated a city's display of a Nativity Scene on the grounds of a building that housed municipal offices.

rather than with the actual holding in that case. The holding in *McCreary* necessarily was limited to the matter of denial of equal access to religious expression in a public forum, because that was the only issue before the Second Circuit in that case.

There is no conflict between decisions of the courts of appeal for purposes of Supreme Court Rule 17 unless two courts of appeal have decided the same question in a contrary manner. The fact that one court of appeals may have analyzed a decision of this Court in a manner that differs somewhat from the analysis of the same decision by another court of appeals creates no conflict between the courts of appeal for purposes of Rule 17, and furnishes no necessity for the exercise of jurisdiction on certiorari by this Court.

When squarely faced with the issue of whether a governmental body may officially display a purely religious symbol on public property, the courts of appeal have all come to the same conclusion. Such an official display of a purely religious symbol by a governmental body has been held, without qualification, to be violative of the Establishment Clause. Since the official display of purely religious symbols by governmental bodies has consistently been held unconstitutional by the courts of appeal, there is no need for this Court to exercise jurisdiction on certiorari in order to resolve any conflict among the federal courts of appeal.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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